Supreme Court, U.S.

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No.

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In The

# Supreme Court of the United States

October Term, 1996

DARRELL CLARK and SHANNA CLARK a/n/f OF KENNEDI CLARK,

*Petitioners,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

## PETITION FOR A WRIT OF CERTIORARI

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34 pp

## QUESTIONS PRESENTED

1. Does the *Feres* Doctrine bar a Federal Tort Claims Act case brought on behalf of an Operation Desert Storm veteran's daughter who was born with severe congenital defects?

2. Does the *Feres* Doctrine bar a Federal Tort Claims Act case brought by a veteran for negligent post-discharge failure to warn veterans of Operation Desert Storm that their offspring had an increased risk of serious genetic damage due to chemical exposure?

3. Should *Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950) be overruled?

## LIST OF ALL PARTIES

Plaintiff-Petitioner:

Darrell Clark and Shanna Clark a/n/f of Kennedi Clark

Defendant-Respondent:

United States of America

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Darrell Clark and Shanna Clark a/n/f of Kennedi Clark respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals is unreported and is attached as Appendix A. The opinion of the district court is also unreported and is attached as Appendix B.

## STATEMENT OF JURISDICTION

The court of appeals entered its judgment on April 16, 1997. Petitioner's Petition for Rehearing and Suggestion for En Banc Consideration were denied by written order on June 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1346(b) provides, in relevant part:

> . . . The district courts shall have exclusive jurisdiction of civil actions on claims against the United States for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §§ 2680(a) and (j), provides:

> The provisions of this chapter and section 1346(b) of this title shall not apply to:
>
> (a) any claim based upon an act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused.
>
> . . .
>
> (j) any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

## STATEMENT OF THE CASE

This case concerns whether the *Feres* Doctrine should be extended to exclude the claims of minor children who were not born at the time their parents were active duty military personnel. In particular, the question is whether the *Feres* Doctrine can be held to bar the claim of a minor child for severe birth defects which were connected to her father's military service in Operation Desert Storm. This case also presents the question of whether the *Feres* Doctrine applies to a claim that the government negligently failed to warn the former soldier, post-discharge, that he was at heightened risk for fathering genetically damaged children. Finally, the larger question is whether *Feres*

itself should simply be overruled because it was an incorrect decision to begin with.

Although the first two questions have never been resolved by this Court, Justice Ginsberg, when she was a member of the United States Court of Appeals for the District of Columbia Circuit, stated in a case very similar to the present one, she did not believe the *Feres* Doctrine automatically excluded the FTCA claims of a serviceman's wife and children. Justice Ginsberg stated that the court's holding enlarged a "problematic court precedent." *Lombard v. United States,* 690 F.2d 215, 233 (1982) (Ginsberg, J., dissenting). Justice Ginsberg correctly analyzed the claims of servicepeople's spouses and children under the three-part test first set forth in *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666, 671-72, 97 S. Ct. 2054, 2057-58, 52 L. Ed. 2d 665 (1977). In her analysis, Justice Ginsberg pointed out that the majorities' reflexive application of the "genesis incident to service" test strayed from the Supreme Court's instructions in *Stencel.*

In the present case, the district court, by its reflexive application of the "genesis incident to service" test, strayed from the proper analysis under *Stencel.* The court completely failed to confront the fact that a civilian whose spouse or parent is a veteran does not bear the relationship to the government that a soldier on active duty does. Furthermore, the court failed to note that Kennedi Clark, the minor, will receive no benefits under the Veterans' Benefits Act. Instead, the court concluded that the child's claim was derived from the father's claim and thus barred.

**A. Proceedings Below**

The Clarks commenced this suit under 28 U.S.C. §§ 1346(b), 1402(b), 2401(b), 2402 and 2671-2680. Thus, the district court properly had federal question jurisdiction according

to 28 U.S.C. § 1331. The Clarks sued the United States of America making two primary allegations. First, the Clarks sought damages for genetic and birth defects suffered by their infant daughter as a result of drugs and injections administered to the father of the minor daughter during his military service in Operation Desert Storm. Secondly, the Clarks alleged that the United States of America was negligent in failing to warn servicemen that this exposure could cause birth defects in their children. The testimony by experts will be that the United States Government had this information at the time and disseminated it on a limited basis, but did not disseminate it generally to all servicepeople, including Darrell Clark. Following Darrell Clark's discharge from the military, Darrell and Shanna conceived Kennedi Clark. Kennedi Clark was born on September 14, 1992. Kennedi Clark at birth suffered from numerous defects, including: congenital disseminated hemangiomatosis, both internal and external; severe respiratory problems; congenital hypothyroidism and cardiac murmurs.

The United States of America filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction alleging that the Plaintiff's claims, including the minor child's, were outside the waiver of sovereign immunity under the Federal Tort Claims Act. Specifically, the United States alleged that the Clarks' claims were barred by *Feres v. United States,* 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950) and its progeny. The United States alleged that all of the Clarks' claims, including the claims for injuries to Kennedi Clark had their "genesis in the service related injury of a soldier." The United States also claimed that the Federal Tort Claims Act discretionary function exception and the FTCA's combatant activities exception barred the Clarks' recovery. *See* 28 U.S.C. §§ 2680(a), 2680(j). The United States District Court for the Eastern District of Texas, Sherman Division, granted the United States' Motion and dismissed the Clarks' case for lack of subject matter jurisdiction. The court's

final order with memorandum opinion was filed on July 3, 1996. The court's memorandum opinion and order are attached to this Petition as Appendix B. Essentially, the district court adopted all of the arguments in the United States' Motion and held that the *Feres* Doctrine barred suit by a serviceperson's daughter born with severe birth defects because those birth defects had their "genesis" in the service related injuries of a soldier. Interestingly, the district court completely failed to address the Clarks' claim that the United States Government failed to warn the Clarks, post-discharge, of the risk of fathering babies with congenital genetic defects as a result of chemical exposures during Operation Desert Storm.

The Clarks appealed the district court's dismissal to the Fifth Circuit, which affirmed the district court's order granting the Motion to Dismiss for the same reasons set forth by the district court. *See* Appendix A, opinion of the Fifth Circuit, April 15, 1997. Clarks' filed a Petition for Rehearing which was also denied by the Fifth Circuit on June 10, 1997.

**B. Summary of the Issues**

*1. The Federal Tort Claims Act does not automatically bar suits by servicepeople's children for injuries which are in some way related to the parent's military service.*

The Federal Tort Claims Act (FTCA) renders the United States liable to *all* persons injured by the negligence of government employees. *United States v. Johnson,* 481 U.S. 681, 692, 107 S. Ct. 2063, 2070, 95 L. Ed. 2d 648 (1987) (Scalia, J., dissenting). The Act, as it is written, clearly applies to the children of servicepeople. The other exceptions to the FTCA do not generally exclude FTCA suits brought by servicepeople or their children. In this case, the district court held, and the Fifth Circuit affirmed, that a serviceman's child's suit should

be dismissed *ab initio* based on a line of court of appeals cases which have stretched a problematical precedent far beyond the fact situation it was intended to cover. There is nothing in the text of the FTCA which precludes suits brought by servicepeople's children for injuries which have some relation to the parents' military service. There is nothing in the legislative history to show that Congress intended this result.

*2. The District Court's reflexive application of the "genesis incident to service" test violates this Court's instructions in Stencel.*

Justice Ginsburg correctly noted during her tenure with the District of Columbia Circuit Court of Appeals that "reflexive application of the 'genesis incident to service' test advocated by the government would stray from the Supreme Court's instructions in *Stencel.*" *Lombard v. United States,* 690 F.2d 215, 232 (D.C. Cir. 1982) (Ginsburg, J., dissenting). Justice Ginsburg wrote that when considering the applicability of *Feres* and novel claims brought by persons other than service members have undertaken the *Stencel* analysis. *Id.* In the present case, the District Court reflexively applied the "genesis incident to service" test without analyzing any of the factors set forth in *Stencel.* In applying the *Stencel* factors to the present case, it is clear that the first two factors are not obstacles to recovery. There is no distinctively federal relationship between Kennedi Clark and the government. Second, Kennedi Clark is *not* eligible for any benefits under the Veterans' Benefit Act. As Justice Ginsburg pointed out, the risk to military discipline posed by these types of FTCA claims is not grave enough to bring these claims within the reach of the *Feres* Doctrine. *Id.* at 233.

*3. Feres is a flawed precedent and should be overruled.*

As Justice Scalia so eloquently demonstrated, *Feres* itself is a flawed precedent and should be overruled. *See United States*

*v. Johnson*, 481 U.S. 681, 107 S. Ct. 2063, 95 L. Ed. 2d 648 (1987) (Scalia, J., dissenting). Nothing in the text of the FTCA or in its legislative history indicates that Congress intended to bar *Feres* type cases. As Justice Scalia noted, none of the rationales given in *Feres* or thought up later justifies the result. *Feres* was a flawed precedent to begin with and heartily deserves all of the criticism it has since received.

## REASONS FOR GRANTING THE WRIT

There is currently a conflict between the court of appeals circuits relating to the claims of servicepeople's children and the effect of the *Feres* Doctrine. Compare *Romero by Romero v. United States*, 954 F.2d 223 (4th Cir. 1992) with *Scales v. United States*, 685 F.2d 970 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983). In *Scales*, the Fifth Circuit used *Feres* to dismiss an FTCA claim filed on behalf of an infant suffering from congenital rubella syndrome allegedly caused by negligent medical care provided to the child's mother during her basic training. However, the Fourth Circuit reached the opposite conclusion in *Romero*, holding that negligent prenatal care given to the infant's mother while she was active-duty military did not bar a medical negligence case against the United States. *See Romero*, 954 U.S. at 224-227. In fact, there is a wide divergence between the courts of appeals in dealing with this issue. The Fourth Circuit and the Eleventh Circuit both hold that FTCA suits by service member's children are not necessarily *Feres* barred under the "genesis" test. *Id.* at 223; *see also Del Rio v. United States*, 833 F.2d 282 (11th Cir. 1987). The Third, Fifth, Sixth, Ninth and D.C. Circuits have all held that *Feres* barred suits by service member's children. *See Mondelli v. United States*, 711 F.2d 567 (3rd Cir. 1983), *cert. denied*, 465 U.S. 1021 (1984); *Scales v. United States*, 685 F.2d 970 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983); *Irvin v. United States*, 845 F.2d 126 (6th Cir.), *cert. denied*, 488 U.S. 975 (1988); *Lombard v. United States*, 690 F.2d 215 (D.C. Cir. 1982), *cert.*

*denied*, 462 U.S. 1118 (1983); *Monaco v. United States*, 661 F.2d 129 (9th Cir. 1982), *cert. denied*, 456 U.S. 989 (1982).

Despite this Court's opinion in *United States v. Brown*, 348 U.S. 110, 755 S. Ct. 141, 99 L. Ed. 139 (1954), there has also developed a split among the circuits concerning whether *Feres* bars post-discharge failure to warn claims. Several courts following *Brown*, have recognized the possibility of a serviceman or his offspring bringing an FTCA claim for a new and independent tort when the claim involved the aggravation of injury. *See M.M.H. v. United States*, 966 F.2d 285, 288-89 (7th Cir. 1992); *Cole v. United States*, 755 F.2d 873, 876-77 (11th Cir. 1985); *Broudy v. United States*, 661 F.2d 873, 876-77 (9th Cir. 1981) (suit for negligent failure to warn, monitor and treat serviceman exposed to radiation, *Feres* would not bar claim of post-discharge negligence).

Other circuits have taken the position that post-discharge failure to warn claims are also barred under *Feres* because the plaintiffs are in reality only alleging a continuation of a pre-discharge failure to warn, rather than an independent tort. *See Laswell v. Brown*, 683 F.2d 261, 266-67 (8th Cir. 1982), *cert. denied*, 459 U.S. 1210, 103 S. Ct. 1205, 75 L. Ed. 2d 446 (1983); *Lombard v. United States*, 690 F.2d 215, 220 (D.C. Cir. 1982), *cert. denied*, 462 U.S. 1118, 103 S. Ct. 3086, 77 L. Ed. 2d 1347 (1983); *Gaspard v. United States*, 713 F.2d 1097, 1100-01 (5th Cir. 1983), *cert. denied*, 466 U.S. 975, 104 S. Ct. 2354, 80 L. Ed. 2d 826 (1984). Neither the district court nor the court of appeals addressed plaintiffs' allegations that the United States commited an independent tort by failing, post-discharge, to warn Clark that due to the chemical exposures in question, he had a significantly increased risk of producing genetically damaged offspring.

Under the current situation, whether a service member's child may recover under the FTCA, and whether a serviceman may recover for a post-discharge failure to warn claim, is wholly dependent on where the service person lives. It is ironic in the extreme that whether *Feres* applies to certain claims is geographically based because one of the original rationales justifying the *Feres* decision was that Congress could not intend local, and therefore geographically diverse tort law to control this federal relationship. *See Feres v. United States*, 340 U.S. at 142-144, 71 S. Ct. at 157-158. Yet, given the current state of *Feres* jurisprudence, that is precisely what is happening.

In this case, the Court reflexively applied the "genesis incident to service" test without any analysis of the *Stencel* factors. Thus, the question squarely presented is whether a serviceperson's child, whose injuries are in some sense connected to the parent's military service, is automatically barred by *Feres* from bringing suit. The second issue presented is whether the government's failure to warn Petitioner, post-discharge, of his increased risk of fathering severely damaged children due to chemical exposure is actionable notwithstanding *Feres*. Finally, the issue which lurks behind all other issues in this case is whether this Court should put an end to all of havoc wreaked by its decision in *Feres*.

## I.

## THE DISTRICT COURT'S OPINION IMPROPERLY APPLIES THE "GENESIS INCIDENT TO SERVICE" TEST WITHOUT REFERENCE TO THE *STENCEL* FACTORS.

This Court has set out the factors to be analyzed when considering the applicability of *Feres* to novel claims brought by persons other than service members. *Stencel Aero*

*Engineering Corp. v. United States*, 431 U.S. 666, 671-72, 97 S. Ct. 2054, 2057-58, 52 L. Ed. 2d 665 (1977). This analysis has been applied in several *Feres* cases subsequently decided by the Court. *See United States v. Johnson*, 481 U.S. 681, 107 S. Ct. 2063, 95 L. Ed. 2d 648 (1987). The three factors identified in *Stencel* are as follows: (1) The relationship between the Government and members of its armed forces is "distinctively federal in character." Therefore, it "makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to the serviceman"; (2) The existence of generous Veterans Administration disability and death benefits is an independent reason why the *Feres* doctrine bars suit for service related injuries; (3) *Feres* types of claims would involve the judiciary in "sensitive military affairs at the expense of military discipline and effectiveness."

When considering the claim of Kennedi Clark, the first two *Stencel* factors have absolutely no bearing. Kennedi Clark, as a civilian, has no distinctly federal relationship with the government which would make it unseemly to allow state law to affect the federal government's liability. Secondly, because Kennedi Clark is a civilian, she is not eligible for Veterans Administration benefits. Kennedi Clark's only remedy, her only chance at compensation for her devastating and lifelong injuries, is through a Federal Tort Claims Act suit.

The third factor, the potentially deleterious effect upon military discipline of judicial scrutiny, is the only factor which has any potential bearing in this case. As Justice Ginsburg noted in her dissent in *Lombard*, the blanket argument that judicial scrutiny of military orders would adversely affect discipline is overbroad. The effect of this argument would be to preclude all civilian FTCA claims for damages arising from military exercises. However, the FTCA clearly does not bar such claims unless they arise "during time of war." 28 U.S.C. § 2680(j). In

this case, the injuries to Kennedi Clark did not appear until after she was born and after her father had been discharged from the military.

When compared to a lifetime of devastating medical bills and extreme emotional suffering, it seems a small price to pay to ask a few military people to come into court and give testimony about certain decisions made years ago. The risk to "military discipline" seems more speculative than real in the instant case. It is clearly ludicrous to argue that if Kennedi Clark's case is allowed to progress, and if by chance she were successful, soldiers across the country would begin disobeying their superiors' orders.

Furthermore, simply barring Kennedi Clark's claim by labeling it "derivative" is wrong. If the claim is "derivative," then it is derivative of Darrell Clark's post-discharge failure to warn claim which is *not* barred by *Feres*. The district court's designation of Kennedi Clark's claim as "derivative" of Darrell's and therefore *Feres* barred is precisely the kind of reflexive application of the "genesis incident to service" test condemned by Justice Ginsburg in her *Lombard* dissent. *See Lombard*, 690 F.2d at 231-32.

## II.

## *FERES* SHOULD BE OVERRULED.

As Justice Scalia, joined by Justice Stevens, pointed out ten years ago, the *Feres* doctrine is not supported by either the text of the FTCA, the legislative intent of Congress, or by logic. "*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received." *Johnson*, 107 S. Ct. at 2074 (quoting *In Re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 1242, 1246 (E.D.N.Y.), *appeal dism'd*, 745 F.2d 161 (2nd Cir. 1984)).

Petitioner will not restate all of the arguments previously set forth in Justice Scalia's dissent. However, it should be noted that one of the post-hoc rationalizations of *Feres*, the "military discipline" factor, may actually work dramatically against the Government. Surely military discipline and morale will be adversely affected by the knowledge of servicemen that if they father genetically damaged children due to chemical exposure while serving in the military, the government will be unwilling to do anything to help them or their children.

As Justice Scalia also noted in *Johnson*, the stated goal of *Feres* to make the entire statutory system a workable, consistent and equitable whole has not been met. Due to the numerous conflicting lines of cases under *Feres*, this case would have had a radically different result had it been brought in the Fourth, Seventh, Eighth, Ninth or Eleventh Circuits. *See Romero by Romero v. United States*, 954 F.2d 223 (4th Cir. 1992); *M.M.H. v. United States*, 966 F.2d 285 (7th Cir. 1992); *Mossow by Mossow v. United States*, 987 F.2d 1365 (8th Cir. 1993); *Broudy v. United States*, 661 F.2d 125 (9th Cir. 1981); *Del Rio v. United States*, 833 F.2d 282 (11th Cir. 1987). Surely this type of geographical fortuity, even arbitrariness, was never intended by Congress. This Court should grant the Petition for Writ of Certiorari and resolve the numerous conflicts in *Feres* jurisprudence by overruling *Feres* itself. It is time to bring an end to this arbitrary and senseless bar to lawsuits.

The Petitioner adopts and reurges all of the arguments in support of overruling *Feres* set forth by Justice Scalia, joined by Justice Stevens, in his dissent in *Johnson*, 107 S. Ct. at 2070. For all of the reasons set forth therein, *Feres* should be overruled.

## CONCLUSION

This is an ideal case for the Court to reconsider the continuing viability of *Feres* and its progeny. There is a split of authority among the circuits on whether *Feres* bars FTCA suits by servicepeople's children whose injuries are connected to the parent's military service. In this case, the Fifth Circuit endorsed the district court's conclusion that because the child's injuries were related to the father's military service, the court had no jurisdiction to hear the case. There was no analysis of the *Stencel* factors. It did not matter that the government has no special relationship with the child; it did not matter that the child will not recover any Veterans' act Benefits; and it did not matter that the issue of military discipline is speculative at best. The court simply applied an unthinking and reflexive interpretation of the "genesis incident to service" test. If the court's interpretation of *Feres* is correct, then *Feres* itself should be overruled. The *Feres* case has been universally criticized, it is a judicially created bar to lawsuits which is not supported by the text of the FTCA, by the intent of Congress, or by logic. It is a precedent which has proven unworkable and arbitrary and should be pruned from this nation's jurisprudence.

These reasons justify a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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## APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AFFIRMING ORDER GRANTING MOTION TO DISMISS FILED APRIL 15, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-40858
Conference Calendar

DARRELL CLARK and SHANNA CLARK, Individually and as next friend of KENNEDI CLARK, a minor,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:96-CV-34

Before REAVLEY, DAVIS, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Appellants argue that the district court erred in dismissing their action under the Federal Tort Claims Act for lack of subject-

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

matter jurisdiction. We have reviewed the record and the briefs on appeal and AFFIRM the district court's order granting the motion to dismiss for essentially the same reasons set forth by the district court. *Darrell Clark and Shanna Clark, Individually and a/n/f Kennedi Clark, a minor v. United States*, No. 4:96-CV-34 (E.D. Tex. July 5, 1996).

AFFIRMED

## APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, SHERMAN DIVISION FILED JULY 3, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

4:96cv34

DARRELL CLARK and SHANNA CLARK, Individually and a/n/f KENNEDI CLARK, a Minor,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

### MEMORANDUM OPINION and ORDER

On this day came on for consideration Defendant's motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. The Court having considered the motion, response, reply, and complaint is of the opinion that the motion should be granted.

### BACKGROUND

Darrell Clark ("Clark") served as a sergeant in the United States Army in Saudi Arabia during Operation Desert Storm. Clark received shots and medication from the Army while on active duty. Upon returning home he and his wife conceived a

child which was born to them on September 14, 1992. The child ("Kennedi") suffered from a number of serious birth defects which the Plaintiffs allege were caused by Clark's exposure to the toxins he encountered while serving in Saudi Arabia combined with the medications and shots he received from the U.S. Army.[1] Clark filed a claim under the Federal Tort Claims Act ("FTCA"). His claim was denied and he subsequently brought suit in this Court under the FTCA §§ 1346(b), 1402(b), 2401(b), 2402, and 2671-2680.

On April 22, 1996, Defendant filed its motion under FED. R. CIV. P. 12(b)(1) contending that this Court lacks subject matter jurisdiction. Specifically, Defendant argues this case was not timely filed. Further, Defendant argues sovereign immunity has not been waived and thus the Plaintiffs' claim is barred. Finding both of Defendant's arguments true, the Court is of the opinion that the motion should be granted.

## DISCUSSION

### I. *Plaintiffs's Claim is not Timely.*

Defendant argues that Plaintiffs filed suit in this Court prematurely because Plaintiffs have not exhausted all their administrative remedies. An action which is instituted prior to the exhaustion of administrative remedies under the FTCA must be dismissed. 28 U.S.C. § 2675(a). Federal agencies have six months after the filing of a timely request for reconsideration

1. Plaintiffs' complaint alleges that Clark served in the United States Army during the Persian Gulf War. However, Plaintiffs filed their claim with the United States Air Force. The record before the Court does explain why the claim was filed with Air Force and not the Army, but since neither party contends that this procedure was improper the Court will not address this.

within which to finally dispose of an administrative claim under the FTCA. 28 C.F.R. § 14.9(b) (Attorney General's regulations governing FTCA administrative claims); 32 C.F.R. §§ 842.87(c) (U.S. Air Force regulations).

In its brief in support of its motion to dismiss, the United States indicated that less than six months prior to filing this suit, Plaintiffs submitted a notice of appeal to the U.S. Air Force requesting that it reconsider its final denial of Plaintiffs' claim. At the time this case was filed, no action had been taken on Plaintiffs' request. Attached documents show this is true. See DEFENDANT'S EXHIBITS A and B. Plaintiffs do not contest this. As Plaintiffs' brief states: "Plaintiff [sic] would therefore not object to the dismissal of this claim without prejudice to refile same should the reconsideration of the FTCA claim be denied." Accordingly, the Court finds Plaintiffs' case was not timely filed and Defendant's motion should be granted.

## II. *Plaintiffs' Claim is Barred By Sovereign Immunity.*

### *A. The Feres Doctrine*

Defendant contends this case is barred because the United States has not waived sovereign immunity under the FTCA for claims arising from military service. Claims for injuries which arise out of or in the course of activities incident to military service are not waived under the FTCA. *Feres v. U.S.*, 71 S. Ct. 153, 155-158 (1950); *Stencel Aero Engineering Corp. v. U.S.*, 97 S. Ct. 2054, 2057 (1977); *U.S. v. Johnson*, 107 S. Ct. 2063, 2066-67 (1987). Plaintiffs contend the *Feres* doctrine should not apply to the facts in this case because Kennedi's injury is not service connected.

*Appendix B*

Contrary to Plaintiffs' position, the 5th Circuit has consistently held that the *Feres* doctrine applies to injuries allegedly sustained by a spouse or child of a solider incident to service. In *Scales v. U.S.*, 685 F.2d 970, 974 (5th Cir. 1982), the 5th Circuit held the *Feres* doctrine barred a claim by a child born with congenital rubella syndrome allegedly as a result of vaccines pregnant servicewomen received. Similarly, the 5th Circuit held the *Feres* doctrine barred a claim by a spouse who allegedly suffered miscarriages as a result of chromosomal damage inflicted on her because her husband, a serviceman, had been exposed to radiation. *Gaspard v. U.S.*, 713 F.2d 1097, 11012-02 (5th Cir. 1983), *cert. denied sub nom., Sheehan v. U.S.*, 104 S. Ct. 2354 (1984). Other Circuit courts have reached similar conclusions. See *Hinkie v. U.S.*, 715 F.2d 96, 98-99 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 1276 (1983); *Lombard v. U.S.*, 690 F.2d 215, 223-226 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 3086 (1983); *Laswell v. Brown*, 683 F.2d 261, 269 (8th Cir. 1982), *cert. denied sub nom., Laswell v. Weinberger*, 103 S. Ct. 1205 (1983); *Monaco v. U.S.*, 661 F.2d 129, 133-34 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 2269 (1982).

In their complaint Plaintiffs allege the birth defects Kennedi suffered had their genesis in service-related injuries of a solider. Plaintiffs' claim that pyridostigmine tablets and injections were negligently administered and pesticides were negligently issued to Clark, a soldier on active duty, who was also exposed to other chemical agents. As a result Plaintiffs allege Kennedi was born with severe birth defects. Because the United States has not waived sovereign immunity under the FTCA for these types of injuries, the Defendant's motion should be granted on this ground.

***B. Discretionary Function***

Additionally, Defendant argues that Plaintiffs' claim is

barred because the decision to administer certain drugs to soldiers was a policy decision. Defendant contends that the United States retains sovereign immunity on claims relating to discretionary policy decisions by the military. Under 28 U.S.C. § 2680(a) the United States retains sovereign immunity on claims which arise from military decisions involving the exercise of policy judgments. *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510, 2518 (1988). In *Boyle*, the Court characterized discretionary decisions as ones that require "the balancing of technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness." *Id.*

The case before this Court falls within this exception. Plaintiffs contend that unapproved drugs were administered to soldiers deployed in Saudi Arabia without their consent. Plaintiffs further contend the government knew these drugs caused birth defects. Assuming *arguendo* Plaintiffs are correct in this assertion, the Court finds that the government nevertheless had to determine if the risk of chemical attacks from Iraq was sufficiently great to warrant the risk to soldiers of administering unapproved drugs which might cause birth defects. This required the government to balance the likelihood that such weapons would be used, the harm that might result if chemical weapons were used, the probability that the drugs administered to soldiers might provide protection against chemical attacks, and the considerations concerning possible side affects soldiers or their children might suffer as a result of using the drugs. These factors are exactly the type of "military, technical, and social considerations" the Court found in *Boyle* to be exceptions to the FTCA. Thus, the Court finds Defendant's motion should be granted on this ground.

*Appendix B*

*C. Combatant Activities*

Finally, Defendant further claims this suit is barred because this case arises out of wartime activities by the military. Defendant argues that the United States retains sovereign immunity in such cases.

Title 28 United States Code, section 2680(j) does not allow a plaintiff to sue the United States for claims which arise out of activities with military forces during war time. It is well established law that a formal declaration of war by Congress is not necessary for 28 U.S.C. § 2680(j) to apply. *Koohi v. United States*, 976 F.2d 1328, 1334 (9th Cir. 1992); *Rotko v. Abrams*, 338 F.Supp. 46, 47 (D. Conn. 1971), *aff'd*, 455 F.2d 992 (2d Cir. 1972) (affirming on basis of district court opinion); *Volegar v. U.S.*, 665 F.Supp. 1295, 1302 (E.D. Mich. 1987); *Morrison v. U.S.*, 316 F.Supp. 78, 79 (M.D. Ga. 1970). As the court in *Koohi* made clear "[N]o one can doubt that a state of war existed when our armed forces marched first into Kuwait and then into Iraq." *Id.* Thus, the Court finds Plaintiffs' alleged injury is barred because sovereign immunity is not waived for injuries relating to Clark's combatant service. Accordingly, Defendant's motion should be granted on this ground as well.

**CONCLUSION**

For the reasons stated above, Defendant's motion to dismiss for lack of subject matter jurisdiction should be granted.

IT IS SO ORDERED.

Signed this 3rd day of July, 1996.

s/ Paul Brown
UNITED STATES DISTRICT JUDGE

## APPENDIX C — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, SHERMAN DIVISION FILED JULY 3, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

4:96cv34

DARRELL CLARK and SHANNA CLARK, Individually and a/n/f KENNEDI CLARK, a Minor,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

FINAL JUDGMENT

For the reasons set forth in the Court's Memorandum Opinion and Order of even date herewith, it is hereby

ORDERED and ADJUDGED that Defendant's Motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure is granted and this case is DISMISSED with prejudice. All costs shall be borne by the party incurring the same.

Signed this 3rd day of July, 1996.

s/ Paul Brown
UNITED STATES DISTRICT JUDGE

## APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, SHERMAN DIVISION FILED AUGUST 1, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

4:96cv34

DARRELL CLARK and SHANNA CLARK, Individually and a/n/f KENNE[illegible] CLARK, a Minor,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

### ORDER

On this day came on for consideration Motion to Reconsider Memorandum Opinion and Order filed by the plaintiffs. The Court having considered the motion and response thereto, is of the opinion that the motion should be granted in part and denied in part.

In their motion, plaintiffs contend that their claims should have been dismissed without prejudice instead of with prejudice. In support of this contention plaintiffs allege that their administrative claim, SF-95, is being reconsidered by the United States Air Force. It was not the Court's intention to prejudice plaintiffs' right to have their administrative claim SF-95 reconsidered by the United States Air Force. The Court's

*Appendix D*

Memorandum Opinion and Order filed on July 3, 1996, should be amended to dismiss all of plaintiffs' claims with prejudice, except to the extent any of such claims are being reconsidered in administrative claim SF-95 by the United States Air Force. These claims should be dismissed without prejudice.

IT IS SO ORDERED.

Signed this 1st day of August, 1996.

s/ Paul Brown
UNITED STATES DISTRICT JUDGE

## APPENDIX E — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED JUNE 10, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-40858

DARRELL CLARK, Individually and as next friend of Kennedi Clark, a minor; SHANNA CLARK, Individually and as next friend of Kennedi Clark, a minor

Plaintiffs - Appellants

v.

UNITED STATES OF AMERICA

Defendant - Appellee

Appeal from the United States District Court for the Eastern District of Texas, Sherman

**ON PETITION FOR REHEARING**

Before REAVLEY, DAVIS and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

s/ Thomas M. Reavley
United States Circuit Judge

(2)

Supreme Court, U.S.
FILED
NOV 10 1997
CLERK

No. 97-419

# In the Supreme Court of the United States

OCTOBER TERM, 1997

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DARRELL CLARK, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

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1688

## QUESTIONS PRESENTED

1. Whether the *Feres* doctrine (*Feres* v. *United States*, 340 U.S. 135 (1950)), bars this suit under the Federal Tort Claims Act brought (i) on behalf of an Operation Desert Storm veteran's daughter who was born with congenital defects, and (ii) by the veteran himself for negligent post-discharge failure to warn veterans of Operation Desert Storm that their offspring allegedly had an increased risk of serious genetic damage due to chemical exposure.

2. Whether the judgment of the court of appeals rests on independent and sufficient grounds that are not challenged in the petition for a writ of certiorari.

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# In the Supreme Court of the United States

OCTOBER TERM, 1997

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No. 97-419

DARRELL CLARK, ET AL., PETITIONERS

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UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 116 F.3d 476 (Table). The opinion of the district court (Pet. App. 3a-8a) is reported at 974 F. Supp. 895.

### JURISDICTION

The judgment of the court of appeals was entered on April 16, 1997. The order denying rehearing was entered on June 10, 1997. Pet. App. 12a. The petition for a writ of certiorari was filed on September 8, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Darrell Clark, a former serviceman, along with his wife Shanna and on behalf of their daughter Kennedi, brought this suit under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, seeking compensation for injuries that allegedly resulted from Darrell Clark's exposure to drugs and chemical toxins during his service in the United States Army. Petitioners alleged that Kennedi Clark's birth defects resulted from Darrell Clark's exposure to drugs and various chemicals during his military service in the Persian Gulf War. Pet. 4; Pet. App. 3a-4a.

On the government's motion, the district court dismissed petitioners' claims for lack of subject matter jurisdiction. The district court identified four independent bases for dismissal. First, the claim was untimely because petitioners filed suit before their administrative remedies were exhausted. Pet. App. 4a-5a. Second, the court held that the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), bars petitioners' claims. Pet. App. 5a-6a. Third, the district court held that the claims were barred by the discretionary function exception to the FTCA, 28 U.S.C. 2680(a). Pet. App. 7a. Finally, the court concluded that the claims fall within the wartime exception to the FTCA, 28 U.S.C. 2680(j). Pet. App. 8a. The district court entered judgment for the United States, dismissing petitioners' claims with prejudice. *Id.* at 9a.[1]

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[1] The district court later modified its judgment to specify that the dismissal was without prejudice to the extent that any of petitioners' claims were being reconsidered in the administrative petition for reconsideration then pending with the United States Air Force. Pet. App. 10a-11a.

The court of appeals affirmed the district court's judgment in a per curiam opinion, expressly adopting the district court's reasoning. Pet App. 1a-2a. The panel also rejected petitioners' request for rehearing. *Id.* at 12a.

## ARGUMENT

Further review is not warranted in this case because there is no conflict among the courts of appeals on the issue presented in the petition, and because the judgment below stands on three additional grounds not challenged in the petition.

1. a. Contrary to petitioners' submission (Pet. 7-9), there is no conflict among the courts of appeals as to whether the *Feres* doctrine bars a Federal Tort Claims Act suit involving a claim that a service member's exposure to allegedly harmful substances resulted in injury to the service member's child. The cases cited by petitioners in support of their claim of a circuit conflict concerned the availability of an FTCA action for negligent prenatal care to a pregnant servicewoman that resulted in injury to the fetus or newborn child. Pet. 7-8. Those cases have no bearing here. The circuits that allow such a claim do so because they conclude that a physician owes an independent duty to the unborn child, who, as a civilian, is not subject to the *Feres* doctrine. See, *e.g.*, *Romero by Romero* v. *United States*, 954 F.2d 223, 226 (4th Cir. 1992) (child's injury "was caused when the government breached an affirmative duty of care owed directly to him"); *Del Rio* v. *United States*, 833 F.2d 282, 286-287 (11th Cir. 1987). Other courts have disagreed with the Fourth and Eleventh Circuits, holding that *Feres* bars claims that have their genesis in a service member's own claims based on injuries suf-

fered incident to service and concluding that the "genesis" standard precludes a claim for negligent prenatal care. See, *e.g.*, *Persons* v. *United States*, 925 F.2d 292, 296-297 (9th Cir. 1991) (reviewing cases); *Irvin* v. *United States*, 845 F.2d 126, 130-131 (6th Cir.), cert. denied, 488 U.S. 975 (1988); *Scales* v. *United States*, 685 F.2d 970, 973 (5th Cir. 1982), cert. denied, 460 U.S. 1082 (1983); see also Pet. 7-8 (citing cases).[2]

Resolution by this Court of that disagreement, however, would not benefit petitioners, because their claim is not based on allegations of negligent prenatal care or on analogous facts. Rather, petitioners' claim is based on a serviceman's exposure to chemicals, which allegedly resulted in birth defects in that serviceman's subsequently-conceived child. Even in the Fourth and Eleventh Circuits, petitioners' claim would be barred by *Feres*. *Romero* expressly distinguished its holding from the contrary result reached in cases such as this one, which "involv[e] an injury to the service person with consequent genetic injury to [the] offspring." 954 F.2d at 226; see also *ibid.* n.3 (citing cases that bar children's claims for damages resulting from parent's exposure to radiation); *Del Rio*, 833 F.2d at 287 n.8.[3]

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[2] Petitioners contend that the courts of appeals disagree on whether *Feres* bars "FTCA suits by [a] service member's children." Pet. 7. That statement ignores the distinction between claims alleging an independent injury to a fetus while in utero—about which some courts have disagreed (compare *Romero* and *Scales*)—and claims alleging injury to children conceived in the future based solely on allegedly harmful exposure suffered by the service-member parent.

[3] *Del Rio* did not expressly distinguish between prenatal care cases and exposure cases, as did *Romero*. The Eleventh

Petitioners argued in the courts below that *Romero*'s distinction does not apply here because their complaint did not plead any injury to Darrell Clark. See also *Monaco* v. *United States*, 661 F.2d 129, 133 (9th Cir. 1981) (rejecting similar argument), cert. denied, 456 U.S. 989 (1982). But the necessary crux of petitioners' claim is that Darrell Clark's reproductive health was impaired, resulting in his conception of a daughter with birth defects. If he had suffered no reproductive injury from his exposure to the drugs and chemicals he points to, Kennedi Clark's birth defects could not be attributed to that exposure, and petitioners' claim would fail for lack of causation. Accordingly, petitioners can cite no decision permitting an exposure case to proceed notwithstanding the *Feres* doctrine. That result flows from the absence of any independent duty by the government to the potential future offspring of service members. Decisions holding that *Feres* does not bar a civilian's independent tort claim are not supportive of petitioners' argu-

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Circuit's reasoning in *Del Rio*, however, would not extend to the exposure cases (which includes petitioners' claim here). First, the *Del Rio* court relied on the uncontroverted principle that dependents of service members are not precluded by *Feres* from bringing their own independent claims for negligent medical treatment by military personnel. 833 F.2d at 286-287. Second, the Eleventh Circuit's analysis of the rationales underlying the *Feres* doctrine focused on the relationship of the *child* to the military, which is a relevant consideration only because the court had implicitly accepted the notion that the child had an independent tort claim based on a duty owed to the child by the government (separate from any duty owed to the service member parent). See *id.* at 287. That analysis has no application in this case because Kennedi Clark had not been conceived at the time Darrell Clark was exposed to the drugs and chemicals that he alleges caused Kennedi Clark's birth defects.

ment in this case, because no civilian (then conceived or born) had a claim at the time the tort was allegedly committed (Kennedi Clark had not even been conceived until well after Darrell Clark was allegedly exposed to the drugs and chemicals at issue here).

b. With respect to Darrell Clark's contention that the *Feres* doctrine does not bar a suit predicated on a post-discharge failure-to-warn claim, the courts of appeals have uniformly barred such suits if the plaintiff asserts (as petitioners do here) that the government possessed the relevant information of potential harm to service members at the time the person originally suffered injury. Petitioners err in asserting (Pet. 8) the existence of a circuit conflict on that issue. Indeed, the three cases cited by petitioners as permitting some post-discharge failure-to-warn claims are inapposite to this case, because the facts of those cases did not involve such prior knowledge of potential harm by the government and the courts that decided them perceived no disagreement with the decisions of other courts on the question of barring a claim in those circumstances. See *M.M.H.* v. *United States*, 966 F.2d 285, 288 (7th Cir. 1992) (agreeing that "*Feres* bars suit when the government's [alleged post-discharge] failure to warn or treat the plaintiff constitutes a continuation of the earlier, noncompensable tort"); *Cole* v. *United States*, 755 F.2d 873, 876 (11th Cir. 1985); *Broudy* v. *United States*, 661 F.2d 125, 128 (9th Cir. 1981).

Thus, if the government knew of the danger at the time of the original injury to the service member, it incurs no new duty to warn merely because the service member is later discharged. See, *e.g.*, *Lombard* v. *United States*, 690 F.2d 215, 220-223 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983); *Cole*, 755 F.2d

at 876; *Broudy*, 661 F.2d at 128 & n.6 (explaining that post-discharge failure-to-warn claims based solely on a continuing tort theory would "completely abrogate the *Feres* doctrine"). Petitioners appear to concede that their suit alleges that the government knew of the purported danger of exposure from the time Darrell Clark was exposed to the vaccines and toxins. See Pet. 4 (expert testimony would purportedly show that the government "had this information at the time").[4] Accordingly, petitioners' complaint was properly dismissed as barred by the *Feres* doctrine.

c. The decision below correctly affirmed the dismissal of petitioners' suit because exposure cases such as this one are properly within the ambit of *Feres* and its progeny. *Feres* bars claims "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Feres* v. *United States*, 340 U.S. 135, 146 (1950). As this Court has recognized, the *Feres* bar extends to claims by third parties whose injury derives from an injury suffered by the service member. *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977). It would be anomalous—and contrary to *Stencel*—if the United States's protection from claims for injury to service members was limited whenever a third party also suffered solely as a result of the service member's injury.

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[4] Petitioners' complaint did not include any allegation that the government should be held liable for a failure to warn, either before or after Darrell Clark's discharge from service. Thus, petitioners' argument on that issue is unsupported by the pleadings, and their assertion (Pet. 8) that the lower courts failed to reach the question is of no moment.

2. In any event, even if petitioners had identified a conflict among the courts of appeals on an issue actually presented here, this case would not be an appropriate vehicle for resolving it because the judgment below is supported by three additional alternative grounds, and petitioners have not challenged those bases for dismissal. The district court dismissed this case not solely on *Feres* grounds, but also for the independent reasons that: (1) the complaint was not timely filed because petitioners had not exhausted their administrative remedies; (2) the decision to administer certain drugs to soldiers was a policy decision within the FTCA's discretionary function exception; and (3) the claim arose out of combatant activities during time of war, and is therefore expressly excluded from coverage under the FTCA. Pet. App. 4a-8a. The court of appeals adopted the reasoning of the district court, and did not distinguish among the four bases for dismissal. *Id.* at 2a. Each of those rationales independently supports the judgment below, and petitioners' failure to challenge any of them means that petitioners would not benefit from a favorable ruling by this Court on the *Feres* issue.

a. First, petitioners' complaint was filed prematurely. The FTCA requires a claimant to file an administrative claim before bringing suit. See 28 U.S.C. 2675(a). Here, petitioners' administrative claim was denied by the United States Air Force on August 3, 1995. C.A. R.E. 18-19. Following that denial, petitioners were entitled to sue under the FTCA or, alternatively, to seek reconsideration before the administrative agency that denied the claim. See 28 C.F.R. 14.9(b).

Petitioners chose to seek reconsideration, requesting on September 28, 1995 that the Air Force recon-

sider its decision denying their administrative claim.[5] Petitioners then filed this lawsuit on February 2, 1996 (before six months had elapsed). The regulations governing FTCA claims specify that the statutory right to sue does not accrue until six months after a timely request for reconsideration of an administrative decision. 28 C.F.R. 14.9(b); see also 32 C.F.R. 842.90(b) (Air Force regulations). Thus, petitioners had no cause of action until the Air Force had been afforded the designated six month period to act on their reconsideration request. See, *e.g.*, *McNeil* v. *United States*, 508 U.S. 106, 112-113 (1993) (prematurely filed FTCA suit must be dismissed even if the plaintiff's administrative remedies are exhausted while the case is pending). Petitioners' remedy was to file suit when their FTCA cause of action accrued—*i.e.*, after their reconsideration request was denied or after the passage of six months without any decision on that request.[6] The petition does not challenge the dismissal of the complaint on that independent ground.

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[5] Petitioners' counsel sent a letter designated "Notice of Appeal," which asked the Air Force to "reconsider" its denial of petitioners' administrative claims. C.A. R.E. 20-21. Petitioners have not disputed that their letter served as a reconsideration request for purposes of 28 C.F.R. 14.9(b).

[6] Indeed, petitioners did just that, filing a substantively identical lawsuit in the district court after their administrative reconsideration request was denied. *Clark* v. *United States*, No. 4:96CV289 (E.D. Tex. 1997). That proceeding was stayed on February 5, 1997, pending the Fifth Circuit's decision in the appeal of this case. After the Fifth Circuit affirmed the judgment in this case, the district court dismissed the second suit on July 3, 1997. Petitioners have not appealed that decision.

b. Second, petitioners' claim comes within the discretionary function exception to the FTCA, and was properly dismissed for that reason as well. The FTCA expressly precludes any suit based on an agency's or employee's "exercise or perform[ance] [of] a discretionary function or duty * * *, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). As to such claims, the FTCA does not waive the sovereign immunity of the United States. See, *e.g.*, *United States* v. *Varig Airlines*, 467 U.S. 797, 808 (1984).

The district court concluded that "the decision to administer certain drugs to soldiers was a policy decision." Pet. App. 7a. Petitioners' claim here derives from a contention that drugs administered by the military to its soldiers caused birth defects in children of those soldiers. Pet. 4; Pet. App. 3a-4a. The decision to administer drugs to soldiers preparing for the Persian Gulf War required the government to weigh the threat of chemical attacks against any potential inherent dangers of certain drugs that could protect soldiers from such attacks. Those and other factors that the government was required to balance were "exactly the type of 'military, technical, and social considerations'" that undergird the discretionary function exception to the FTCA. *Id.* at 7a, quoting *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 511 (1988). The court of appeals correctly affirmed the district court's dismissal of the complaint on that independent ground. Pet. App. 2a.

c. The district court also held that petitioners' claims were barred because they arose out of wartime activities by the military. Pet. App. 8a. The FTCA does not permit "[a]ny claim arising out of the combatant activities of the military or naval forces, or

the Coast Guard, during time of war." 28 U.S.C. 2680(j).

Petitioners' claims concern allegedly harmful chemical exposure sustained by Darrell Clark while he was in the military during preparation for and service in Operation Desert Storm. Pet. 4; Pet. App. 3a-4a. Petitioners have not challenged in the petition the conclusion by the courts below that the activities of Operation Desert Storm, including the preparation of soldiers for that mission, constituted "combatant activities," and those courts did not err in holding that the Persian Gulf War satisfied the combatant activities exception to the FTCA. See *Johnson* v. *United States*, 170 F.2d 767, 770 (9th Cir. 1948) ("combatant activities" includes "not only physical violence, but activities both necessary to and in direct connection with actual hostilities"); see also *Koohi* v. *United States*, 976 F.2d 1328, 1334 (9th Cir. 1992) (congressional declaration of war not required to come within terms of statute), cert. denied, 508 U.S. 960 (1993).

Because the court of appeals properly upheld the dismissal of petitioners' complaint on those independent grounds, there would be no basis for this Court to reverse the judgment below even if it were to agree with petitioners on the *Feres* issue.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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